NO. 48873-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CARLOS AVALOS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni Sheldon, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY 1

IMPROPER WITNESS TESTIMONY DENIED AVLOS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL 1

B. CONCLUSION 5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Seattle v. Heatley
70 Wn. App. 573, 854 P.2d 658 (1993)
rev. denied, 123 Wn.2d 1011 (1994). 2, 3, 4

In re Det. of Cross
99 Wn.2d 373, 662 P.2d 828 (1983) 2

State v. Barr
123 Wn. App. 373, 98 P.3d 518 (2004)
rev. denied, 154 Wn.2d 1009 (2005). 2

State v. Black
109 Wn.2d 336, 745 P.2d 12 (1987)
rev. denied, 123 Wn.2d 1011 (1994) 1

State v. Demery
144 Wn.2d 753, 30 P.3d 1278 (2001) 1

State v. Farr-Lenzini
93 Wn. App. 453, 970 P.2d 313 (1999) 2

State v. Montgomery
163 Wn.2d 577, 183 P.3d 267 (2008) 2

State v. Quaale
182 Wn.2d 191, 340 P.3d 213 (2014) 1

State v. Thompson
90 Wn. App. 41, 950 P.2d 977
review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998) 1

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.36.011 4

A. ARGUMENT IN REPLY[1]

IMPROPER WITNESS TESTIMONY DENIED AVLOS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), rev. denied, 123 Wn.2d 1011 (1994). A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, rev. denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

Avalos contends, for reasons set forth more fully in the opening brief, that his right to a fair trial was compromised when Investigator DeMars improperly voiced an opinion as to Avalos' guilt, on an essential element of assault, and the only disputed issue in the case. Brief of Appellant (BOA) at 5-12. As shown in the opening brief, this improper opinion testimony necessitates reversal. This result is compelled by State v. Farr-

[1] The State's arguments regarding the ineffective assistance of trial counsel for failing to object to the prejudicial opinion testimony has been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

Lenzini,[2] State v. Montgomery,[3] and State v. Barr[4]. BOA at 5-12.

The State does not distinguish these cases, and in fact does not even discuss them. See Brief of Respondent (BOR) at 3-13; In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). Instead the State relies on City of Seattle v. Heatley,[5] to argue DeMars' testimony was proper testimony "about his own knowledge of shanks, based on his experience gained from years of employment in the prison system." BOR at 10. This argument fails for several reasons.

In Heatley, a police officer testified that Heatley who was charged with a DUI, was "obviously intoxicated." 70 Wn. App. at 576-77. The police officer testified that Heatley's eyes were bloodshot and watery, his face flushed, his speech slurred, his balance unsteady, and that he had a strong odor of alcohol on his breath. Heatley also failed sobriety tests. Heatley, 70 Wn. App. at 576.

---

[2] 93 Wn. App. 453, 970 P.2d 313 (1999).

[3] 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

[4] 123 Wn. App. 373, 381-84, 98 P.3d 518 (2004), rev. denied, 154 Wn.2d 1009 (2005).

[5] City of Seattle v. Heatley 70 Wn. App. 573, 579, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994).

As the Court of Appeals properly recognized, this testimony concerned an evidentiary fact and was based on the officer's direct observations of Heatley's physical appearance and performance on the field sobriety tests. Heatley, 70 Wn. App. at 576, 579, 581. It is well-settled that lay witnesses such as police officers may comment on a defendant's degree of intoxication based on personal observation. Heatley, 70 Wn. App. at 580. To do so is not an opinion on guilt. Heatley, 70 Wn. App. at 579.

DeMars, by contrast, testified based solely on his personal opinion that "shanks are obviously intended to inflict great bodily harm." 2RP 50-51. This was not based on any direct observation, but rather, required an inference on his part that because Avalos possessed a shank, he must have done so with the obvious intent to commit great bodily harm. Although this may have been an allowable inference for the jury, it was not one DeMars could properly make for the jury. The State appears to recognize as much ("Of course, one may extrapolate and reason that if '[s]hanks are obviously intended to inflict great bodily harm[,]' then perhaps Avalos intended to inflict great bodily harm when he attempted to stab Officer Squire in the eye with a shank." BOR at 7-8. DeMars' testimony inferring Avalos' guilt is precisely the type of opinion testimony forbidden by established case law.

Moreover, in Heatley, the Court of Appeals concluded that it was "highly unlikely," that the officer's testimony improperly influenced the jury

because the testimony was not framed in conclusory terms that parroted the relevant legal standard. As the Court noted, the officer's personal observations and testimony about Heatley's inability to safely drive was not an element of driving under the influence. Heatley, 70 Wn. App. at 581.

Unlike Heatley, DeMars' opinion was critical at Avalos' trial given that his testimony concerned an essential element of assault. The State does not dispute that Avalos' intent was material to his defense and was the only disputed issue in the case. See BOR at 9-10. Moreover, unlike Heatley, DeMars' testimony that [s]hanks are obviously intended to inflict great bodily harm[,]" parroted almost verbatim the element of first degree assault requiring proof of "intent to inflict great bodily harm[.]" 2RP 50-51; RCW 9A.36.011(1)(a). DeMars' improper opinion went to the core issue and critical element of whether Avalos committed the assault with the intent to inflict bodily injury. Given Avalos' denial that he intended to inflict great bodily harm, a plausible showing has been made that DeMars' improper opinion impacted the jury's verdict at trial.

Avalos' right to a fair trial was compromised when DeMars expressed an opinion as to his guilt. Admission of this opinion on guilt, which invaded the province of the jury, was manifest constitutional error that violated Avalos' right to a fair trial. Reversal of Avalos' conviction is required.

B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Avalos' conviction and remand for a new trial.

DATED this 24th day of April, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
April 24, 2017 - 2:30 PM
Transmittal Letter

Document Uploaded: 4-488736-Reply Brief.pdf

Case Name: State v. Carlos Avalos

Court of Appeals Case Number: 48873-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ___

Answer/Reply to Motion: ___

■ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ___
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Copy mailed to client: Carlos Avalos 359594 Washington State Penitentiary 1313 North 13th Avenue Walla Walla, WA 99362

Sender Name: Jamilah A Baker - Email: bakerj@nwattorney.net

A copy of this document has been emailed to the following addresses:

timw@co.mason.wa.us